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← A tall order for the “new kid on the block”—the forthcoming market investigation BSkyB/Sky Italy and Sky Deutschland—almost done and dusted? All thanks to Ms reference in the energy market will keep the CMA busy from the start! Murphy perhaps? →

From Portsmouth to Swansea, to Liverpool: testing the limits of the Murphy judgment...

Posted on [March 27, 2014](#) by [aandreangeli](#)

When in October 2011 the Court of Justice of the EU handed down the Murphy preliminary ruling few understated the significance of this decision for the protection of exclusive broadcasting rights across the EU. The judgment was met with dismay by the Premier League and its licensees, who regarded it as marking the end of their ability to differentiate licence fee in each Member State and, in that context, to exact a “premium payment” in certain countries (see especially para. 96-100 and 115-117). In the words of the Court, while “derogations from the principle of free movement can be allowed only to the extent to which they are justified for the purpose of safeguarding the rights which constitute the specific subject-matter of the intellectual property concerned”, this “specific subject matter” does not allow the right holder to extract “the highest possible remuneration” (para. 106-107); in light of the judgment, the holder of the right to broadcast football matches could only ask for remuneration that was “reasonable (...) in relation to the actual economic value” of the service, including the number of potential users (para. 107-109).

On their part, the “advocates for the single market” could only be pleased at the outcome: the Court of Justice took the view that an exclusive license agreement obliging “(...) the broadcaster not to supply decoding devices enabling access to that right holder’s protected subject-matter with a view to their use outside the territory covered by that licence agreement (...)” infringed Article 101 TFEU, on the ground that they eliminated all competition among providers of the same services in the areas of the single market on which they had taken effect (see para. 139, 142-144 and 146). The Court of Justice in effect sanctioned the end of absolute territorial protection in the field of sports broadcasting as contrary both to the rules on competition—consistently with the common market imperative at the basis of much of its Article 101 case law—and on the free movement of services. Once again, the Court of Justice sought to read the concept of “specific subject-matter” of intellectual property rights restrictively, so as to exclude a right to a “premium fee” for the licensor and thereby upholding the “completion of the internal market” as a fundamental goal for the Treaty.

However, the Court of Justice made clear that not all the “parts” of the broadcast would be subjected to these principles: certain elements of it, in as much as they were “the expression of the authors’ own intellectual creation”, such as the logo, the anthem and the “opening sequence” of match broadcasts, would remain within the “subject matter” of the rights enjoyed by the author—in this case, the FAPL. In practice, therefore, cardholders would only be allowed to show the match, without being able also to show the Premier League graphics or play the League’s own anthem. (see para. 152 ff.; see especially para. 158-159): in the Court’s view, unlike the “main broadcast”, i.e. the broadcast of individual football matches, these “fragments” enjoyed legal protection under the applicable rules on copyright so long as it could be demonstrated to the satisfaction of the domestic court that they represented the outcome of their author’s creative endeavour (para. 153-159). These “fragments” should have been, therefore, “effaced” from the “unauthorised” transmission of a match broadcast via a “foreign” decoder card: this restriction of the card-holder’s right to the free movement of broadcasting services was regarded as being justified in light of the need to protect the “subject-matter” of the copyright enjoyed by the authors of these elements of the transmission—in this case, the FAPL itself (para. 156-157; see also case C-5/08, Infopaq, [2009] ECR I-6059, para. 39, 45-46).

Fast forward a few years... when Mr Anthony Luxton, the landlord of the Rhyddings Pub in Swansea was taken to Court by the Premier League on the ground of having “illicitly used” a foreign (in this case, a Danish) decoder card to show

by the Premier League on the ground of having used a foreign (in this case, a Danish) decoder card to show football matches in his pub. IN light of the 2011 landmark preliminary ruling he could have been forgiven for thinking that he could have relied on the “Euro defense” affirmed in the Murphy decision. However, the FAPL had other plans... no longer able to rely on the territorial exclusivity of its licenses within the UK, the Premier League resolved to relying on the “intellectual creation” exception recognised to it by the European Court of Justice to restrain pubs from showing not the “action” on the pitch, but rather the “graphics” and the other “broadcast fragments” which were the outcome of its “creative efforts” and on which it retained full copyright. In *FAPL v Luxton*, Helen Davies QC successfully argued before the High Court that the defendant had infringed the copyright rules protecting these valuable “proprietary fragments” of the broadcast that were, in the words of the EU Court of Justice, the fruit of the “intellectual creation” of the Premier League and whose exclusivity could therefore have been maintained (see: <http://www.bbc.co.uk/news/uk-wales-south-west-wales-25968200>). The decision against Luxton was welcomed by the complainant as a victory for its effort to protect the value of the Premier League’s brand and goodwill in an era in which territorial protection is no longer an option after the Murphy judgment. Importantly, it was made clear that this did not represent an isolated case, but rather it was the first of 100 new copyright prosecutions against those pub landlords and tenants who have opted to exercise their right to freedom of movement of services, as sanctioned by the ‘Murphy’ judgment without however “effacing” the proprietary images and logos from their broadcast.

And lo and behold, the First National Wine Bar in Liverpool City centre was next in line for a similar action: just as Mr Luxton, Mr Berry had shown Premier League matches via a foreign decoder card without, however, “effacing” the proprietary symbols on which the FAPL had registered a copyright. Before the High Court the pub landlord had admitted to having infringed the applicant’s copyright and on that basis the Court awarded the premier league an interim payment over £60,000. Commenting on the local Liverpool Echo (see: <http://www.liverpoolecho.co.uk/news/liverpool-news/liverpool-city-centre-bar-fined-6832195>), Mr Berry claimed that such a hefty legal bill would have landed his enterprise on the verge of bankruptcy: “They didn’t like me showing the football because they’re not getting anything directly from it. I deal with legitimate suppliers. I think they’re pursuing me because I’m a sole trader. I’m one person with no money, and they want to make an example.” (from the same Liverpool Echo article:

<http://www.liverpoolecho.co.uk/news/liverpool-news/liverpool-city-centre-bar-fined-6832195>)

In light of the forgoing and especially bearing in mind the clear resolve of the Premier League to protect its reputation as “embodied” in its logo and anthem, one could wonder what the future holds for any individual or business wishing to rely on his or her prerogatives as a “good EU citizen” and thereby enjoy his or her freedom of movement of services... thanks to a foreign decoder card allowing them to receive FAPL broadcasts. It is clear that in *Murphy* the EU Court of Justice sought to strike a careful balance between securing the effet utile of this fundamental freedom and protecting the “essence” of the copyright insisting on those “proprietary” broadcasting fragments that constituted the outcome of the League’s creative efforts. However, this outcome is likely, at the very least, to keep the English Courts (and perhaps their Scottish counterparts, since an interdict was granted by the Court of Session against Lisini Pub Ltd on petition by the Scottish Premier League in March 2013—see [2013] SLT 629) busy for considerable time. While it is undoubted that the Premier League is seeking to enforce its prerogative as copyright holder at least as regards these elements of the broadcast, which it is possible to efface, it is also clear that invoking the right to freedom of movement of services ‘a la Murphy’ is going to be increasingly riddled with difficulties for individual drinking establishments who may face significant monetary liability, albeit on copyright grounds.

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